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CRIMINAL LAW—AN EMPIRICAL ASSESSMENT OF  
MASSACHUSETTS SUPREME JUDICIAL COURT DECISION-MAKING  
ON CRIMINAL LAW FROM 1995 TO 2014

*Thomas Gray\**

*A key component of America's adversarial, case-based system of law is that each case usually produces a winner, someone who benefits from the application of a legal rule to the facts of their controversy. Of all cases, winners and losers in criminal law are most significant because losing often means a considerable loss in personal freedom. This Article analyzes the winners and losers of criminal appeals before the Massachusetts Supreme Judicial Court as a way of trying to learn about how that court conducts its business and makes decisions in one of its most crucial functions—being the final arbiters of justice in state criminal law. The results indicate a court that rules overwhelmingly against defendants on appeal, but that has drifted by a small amount in a pro-defendant direction over time. A key feature of the court's decisions is unanimity—it decides the vast majority of criminal appeals without dissent. There is also no strong connection between the party that appointed the justice and how they vote, implying that partisanship does not play a strong role in how the court decides criminal cases.*

INTRODUCTION

One of the consistent goals of legal process scholars is to understand how judges come to their decisions.<sup>1</sup> This process has intellectual and historical value from providing insight to understand and explain how decisions are reached: why do the circumstances end with this result? Additionally, this process has important contemporary civic value for understanding how our governing and judicial systems work. We must understand how

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1. See Lee Epstein, Andrew D. Martin & Matthew M. Schneider, *On the Effective Communication of the Results of Empirical Studies, Part I*, 59 VAND. L. REV. 1811, 1816–17 (2006).

existing institutions and actors function to completely understand important social factors, such as the “carceral state,”<sup>2</sup> racial disparities in criminal sentencing,<sup>3</sup> and the independence and separation of the branches of government. Further, understanding the judicial decision-making process has practical value by providing a basis to make informed predictions of future jurisprudence.<sup>4</sup> This is crucially important for lawyers who must build their cases and arguments around their perception of what position a judge is likely to take.

While reading individual cases is a meaningful way to gain insight to a justice’s jurisprudence and thinking on a topic, there are other ways to complement this approach. The quantitative empirical analysis of court outputs is one such method. The benefit of this approach is largely in its ability to aggregate beyond the individual case to see the patterns in judicial behaviors—across time and in various circumstances.<sup>5</sup> A justice may be known for writing a particular opinion limiting law enforcement’s investigative powers, but may have otherwise spent years upholding law-enforcement actions in less salient or widely read cases. Understanding a justice’s theoretical articulation and argument and their actual, repeated behavior is a significant part of understanding how judges exercise judicial authority. This Article analyzes votes of the Massachusetts Supreme Judicial Court (“SJC”) justices cast over a twenty-year period and investigates what insights might be drawn from their actions when evaluated in the aggregate.

## I. SEPARATING DECISIONS AND OUTCOMES

Each case typically produces two distinct outputs. First, the primary focus of legal academic discourse is the legal rule. The legal rule is comprised of interpretations, guidelines, definitions, and explanations that collectively constitute, in the words of Chief

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2. See, e.g., Vesla M. Weaver & Amy E. Lerman, *Political Consequences of the Carceral State*, 104 AM. POL. SCI. REV. 817, 818 (2010) (defining the carceral state as “the totality of this spatially concentrated, more punitive, surveillance and punishment-oriented system of governance”).

3. See, e.g., David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.&L. & ECON. 285 (2001).

4. See, e.g., Jonathan P. Kastellec, *The Statistical Analysis of Judicial Decisions and Legal Rules with Classification Trees*, 7 J. OF EMPIRICAL LEGAL STUD. 204 (2010).

5. See Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, 2002 U. ILL. L. REV. 819 (2002).

Justice John Marshall, “what the law is.”<sup>6</sup> Second, the application of the legal rule to the facts of the case results in a decision for the parties before the court. In short, someone wins while someone else loses.<sup>7</sup> Together these two outputs form the precedential weight of a case: stipulating a rule for lower courts to apply, and providing an example application.

This Article focuses exclusively on the winners and losers of cases. While the legal rules themselves are of great importance, the winners and losers are also very informative about judicial decision-making. This Article specifically focuses on the winners and losers in the most critical type of cases a judge decides—criminal appeals. In these, whether a defendant wins often determines whether, or for how long, the defendant will go to prison. Additionally, when the legal rule application leads to the defendant’s defeat, prosecutorial-leaning precedence is created to be applied in subsequent criminal appeals.

Examining winners in the aggregate offers valuable insight as well. States’ highest courts, such as the SJC, have a high-volume caseload, producing a constant stream of legal rulings. The complexity of these rules makes them difficult to analyze at a level much larger than a small group. The complexity of many legal rules makes their application easily distinguishable. As a result, decisions that rely on the same legal rule may only be analyzed with cases carrying near parallel factual circumstances. Thus, it is difficult to see patterns in decision-making behavior over time. Conversely, justices can be more easily analyzed and compared in the aggregate by looking at case outcomes. For example, potential comparisons include: separate justices to each other, individual justices at differing points in their careers, and the appointees of different governors.

## II. THE DATA

The starting point to build the necessary dataset for this Article is an existing dataset of all SJC opinions from 1995 to 2010.<sup>8</sup> From this, all criminal appeals decided by that court are removed. To cover a larger range of time, Hall and Windett’s work is supplemented by adding criminal appeals from 2011 to 2014.<sup>9</sup> The

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6. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

7. Kastellec, *supra* note 4.

8. Matthew Hall & Jason Windett, *New Data on State Supreme Court Cases*, 13 ST. POL. & POL’Y Q. 427, 433 (2013).

9. To do this, all cases with a Lexis Headnote containing the word “criminal”

result is a final dataset of all criminal law decisions by the SJC spanning a twenty-year period, from 1995 to 2014. Aggregately, a sufficient period for inquiry is created for meaningful analysis.

The Hall and Windett data do not provide information on the crucial question for this Article's analyses: who won the case.<sup>10</sup> Instead, they provide the disposition: whether the lower court ruling was overturned, affirmed, or otherwise disposed.<sup>11</sup> By cross-referencing the lower court's ruling<sup>12</sup> with Hall and Windett's provided disposition, the winner of each case is thereby determined. The logistical determination of "winners" is more straightforward, albeit more tedious, than the substantive determination of what it means to "win." In the simplest cases, the defendant wins when the SJC accepts the challenge raised in full, reversing the lower court's ruling. Consider, for example, *Commonwealth v. Tavaréz*, in which the Commonwealth filed an interlocutory appeal to overturn the Superior Court's suppression of surreptitiously recorded evidence.<sup>13</sup> The court rejected the Commonwealth's claim and thus upheld the ruling leaving the evidence suppressed.<sup>14</sup> In this case, Tavaréz, the defendant, is a clear "winner."

In contrast, the defendant clearly "loses" when the court rejects all their challenges and the lower court's disposition is upheld in its entirety. For example, in *Commonwealth v. Bishop*, Walter Bishop challenged his murder conviction on five different claimed failures of the trial process.<sup>15</sup> Five justices of the SJC rejected each of Bishop's claims.<sup>16</sup> In this example, the court clearly ruled against Bishop, and he is classified as "losing" the appeal.

Everything in between these two clear categories is a gray area. In a small number of cases, the court will accept one of the defendant's challenges, but reject others. For these cases determining a "winner" is difficult. For example, in *Commonwealth v. Mello*, Louis Mello appealed three convictions,

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were added. This approach may not be exhaustive, but should be approximately correct.

10. Hall & Windett, *supra* note 8.

11. *Id.* at 431.

12. This was determined from a variety of sources, including the recitation in the case itself, and/or the case syllabus, and/or the case summary.

13. *Commonwealth v. Tavaréz*, 945 N.E.2d 329, 330 (Mass. 2011).

14. *Id.*

15. *Commonwealth v. Bishop*, 963 N.E.2d 88, 90–91 (Mass. 2012).

16. *Id.* at 91.

two for murder and one for arson.<sup>17</sup> The court vacated the arson conviction and affirmed both murder convictions.<sup>18</sup> It is difficult to devise a consistent system to classify cases of this type as each party, by the definition used above, “wins.” Because these cases represent less than ten percent of criminal cases in Massachusetts, they are excluded from all subsequent analyses.<sup>19</sup>

Finally, individual justices’ votes are examined. All votes for the majority’s disposition (including concurrences) are counted as votes for a pro-defendant outcome when the defendant “wins.” The sources for the justices’ votes come from the Hall and Windett dataset<sup>20</sup> and this author’s own research for 2011 to 2014. Those justices who either wrote or joined a dissenting opinion constitute dissenters. Thus, the dissenters in a disposition upholding the defendant’s conviction are deemed pro-defendant votes by the dissenting justices. Justices not participating in the vote are given no value. These vote tallies are dichotomous and thus can easily be aggregated and combined into a simple percentage.

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17. *Commonwealth v. Mello*, 649 N.E.2d 1106, 1109–10 (Mass. 1995).

18. *Id.* at 1120.

19. Attempted methodologies to incorporate these cases include treating all cases in which a defendant won at least one challenge resulting in a pro-defendant ruling. These did not substantially alter any of the patterns and results presented in this Article.

20. Hall & Windett, *supra* note 8.

### III. DEFENDANT VICTORY RATES OVER TIME

The first analysis rates defendant victories over the full twenty-year period that the dataset covers. Each case is attached to the year in which the decision was published. These results are presented in Figure 1.

FIGURE 1: RATES OF PRO-DEFENDANT OUTCOMES AND VOTES IN THE MASSACHUSETTS SUPREME JUDICIAL COURT, BY YEAR<sup>21</sup>

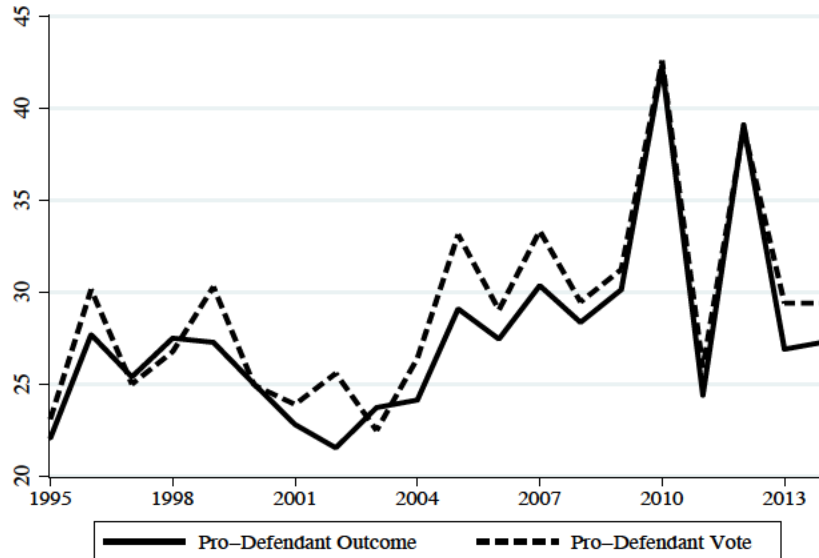


Figure 1 reveals several interesting facts. First, criminal defendants lose a majority of the time on appeal. Even their highest rate of victory, in 2010, was only about forty-three percent. In total, defendants won about twenty-nine percent of the total cases over the twenty-year period. This result is not surprising. Because of the substantial penalties associated with criminal conviction, defendants have strong incentives to pursue their appeals to the highest level possible.<sup>22</sup> For the same reason—the severity of penalties—the SJC may feel a stronger obligation to hear criminal challenges, and lower courts are under pressure to get the rulings on these challenges “right” at the trial in order to keep

21. See *supra* Part II.

22. Vesla Weaver & Amy Lerman, *Political Consequences of the Carceral State*, 104 AM. POL. SCI. REV. 817, 819 (2010).

the wheels of justice moving efficiently. This is because higher courts are more likely to hear criminal appeals with little merit to ensure a defendant's freedom is not erroneously compromised. These facts together mean that many cases with little merit make it to the high court where the convictions are confirmed, thereby inflating the number of defendant losses.

Second, the rate of pro-defendant votes closely matches the rate of pro-defendant decisions. There is a clear reason for this: unanimity.<sup>23</sup> This topic is discussed, *infra* Part VI, but it is important to remain cognizant that the vast majority of SJC decisions are unanimous. This means that votes and outcomes are nearly perfectly aligned.

Finally, there is an upward trend in the data, with more pro-defendant rulings in later years. However, this upward trend is substantially driven by appeals from 2010 and 2012, while 2011 is a below-average year. The peaks of 2010 and 2012 may be explained by the random variation in the release date of decisions, with a cluster of pro-defendant rulings released on the December side of the 2010–11 divide and pro-Commonwealth rulings released on the January side of the 2011–12 divide. Still, even if these peaks were removed, the ten-year baseline from 2005 to 2014 is higher than the ten-year baseline from 1995 to 2004. While the difference between each ten-year period is only about four percentage points, it's a meaningful shift of fifteen to twenty percent given how low the rates are on average.

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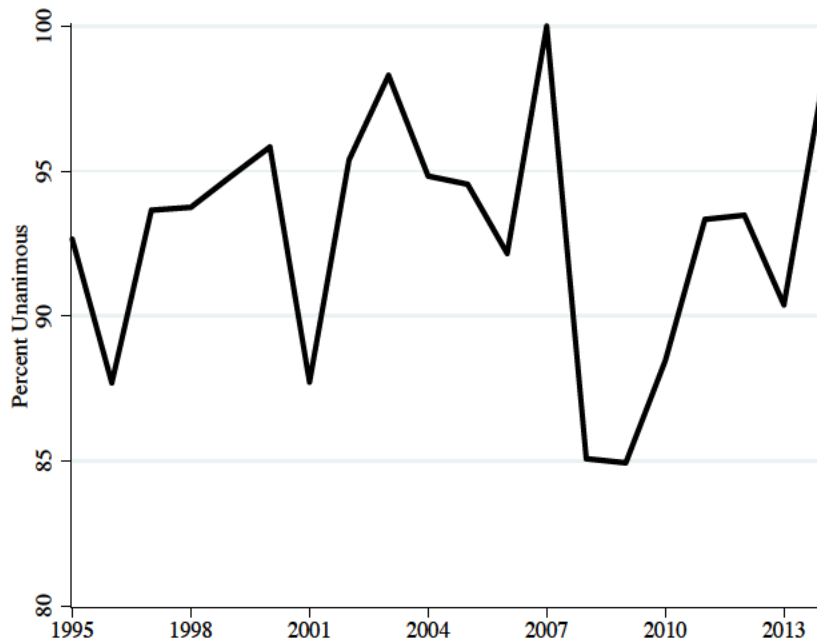
23. See Peter J. Coughlan, *In Defense of Unanimous Jury Verdicts: Mistrials, Communication, and Strategic Voting*, 94 AM. POL. SCI. REV. 375 (2000).



#### IV. UNANIMOUS DECISIONS

One crucial fact for all subsequent analyses, and a remarkable aspect of state judicial decision-making in its own right, is that the vast majority of cases were decided unanimously.<sup>24</sup> Figure 2 shows the percentage of unanimous cases in the dataset by year.

FIGURE 2: PERCENT OF CASES DECIDED UNANIMOUSLY, BY YEAR<sup>25</sup>



The percentages range from a low of eighty-five in 2009 to a high of one hundred in 2007. In total, ninety-three percent of all cases in the dataset were unanimous decisions, leaving only ninety-two total non-unanimous decisions. Despite the variation from year to year, there is no discernable trend in these data. Unanimity has no notable increase over time.

To a certain extent, this high rate of unanimity—or accord between justices—makes sense. In these cases, all justices would agree on the result no matter their own interpretations of criminal law. The matters invoked are not areas of the law in which the justices have substantive disagreement in how to interpret and

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24. See Hall & Windett, *supra* note 8.

25. See *supra* Part II.

apply existing constitutional and statutory law. This is especially true in criminal law, where the same factors that explained defendants' overall low rate of success before the SJC may also explain some of the court's unanimity. Many cases are likely not strong appeals because convicted defendants have no cost in making an appeal and little to lose if they have been sentenced to prison. And defendants convicted of first-degree murder have a right to appeal directly to the SJC.<sup>26</sup>

It is likely, however, that some cases do feature some disagreement between the justices that does not appear in the final decision.<sup>27</sup> The justices' heavy workload<sup>28</sup> forces them towards unanimity, and collegiality norms mean that justices only dissent in rare cases (in these data, only seven percent of the time) when their disagreement is sufficiently stark and important to merit the time and effort necessary to craft a competing opinion.

## V. NOT PLAYING WITH A FULL BENCH

While cases themselves are "unanimous," this does not mean that every justice on the court voted the same, but instead that all justices who participated voted the same. The number of participating justices in a case ranges from four to seven. For example, *Commonwealth v. Carrierre*,<sup>29</sup> a case about the joint-venture exception to the hearsay rule, was heard by just four justices,<sup>30</sup> while cases announced in the days immediately preceding or following *Carrierre* were heard by five, six, or seven justices.<sup>31</sup>

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26. ELSPETH B. CYPHER, CRIMINAL PRACTICE AND PROCEDURE §§ 63:17, 63:19 (Mass. Prac. 4th ed. 2015).

27. Consider, for example, when a court unanimously vacates or alters the ruling of a single justice. In *Bynum v. Commonwealth*, the Court vacated the ruling of a single justice of the SJC in a unanimous opinion. This implies that, at least initially, one justice of the Court came to a different conclusion that is now lost in the unanimity of the final decision. *Bynum v. Commonwealth*, 711 N.E.2d 138, 139 (Mass. 1999).

28. See *About the Supreme Judicial Court*, MASS.GOV, <http://www.mass.gov/courts/court-info/sjc/about/> [https://perma.cc/6LT2-6WTV] (last visited Feb. 15, 2016). The Court typically decides about 200 cases a year, with an additional 600 cases heard by single justices. *Id.*

29. 18 N.E.3d 326 (Mass. 2014).

30. *Id.* at 329–30 (Justices Spina, Corda, Duffly, and Lenk presiding).

31. *Commonwealth v. Garcia*, 18 N.E.3d 654, 657 (Mass. 2014) (heard by five justices, with Justices Spina, Cordy, Botsford, Duffly, and Lenk presiding); *Commonwealth v. LaChance*, 17 N.E.3d 1101, 1102 (Mass. 2014) (heard by six justices, with Justices Spina, Cordy, Botsford, Gants, Duffly, and Lenk presiding); *Commonwealth v. Rollins*, 18 N.E.3d 670, 673 (heard by seven justices, with Justices Gants, Spina, Cordy, Botsford, Duffly, Lenk, and Hines presiding). It is this variation in bench composition that explains most of the variation in how cases are decided.

In Figure 3, the frequency of each number of justices, from four to seven, is presented from the dataset constructed spanning 1995 to 2014.

FIGURE 3: NUMBER OF VOTING JUSTICES<sup>32</sup>

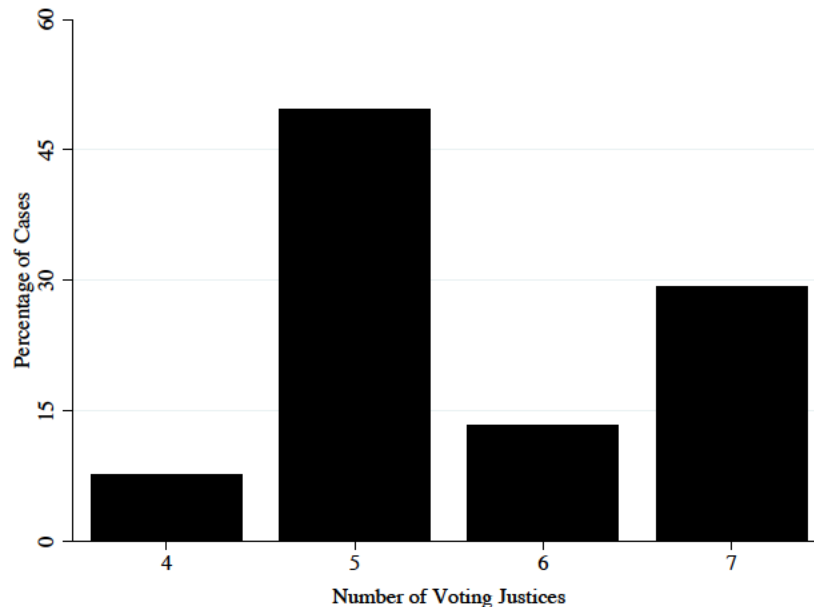


Figure 3 shows that the most common number of sitting justices is five, which occurs in just under half of the relevant appeals, with seven sitting justices the second most common at twenty-nine percent. Six and four justice panels each hear less than fifteen percent of the appeals. These numbers illustrate that most of the time appellants and appellees can expect that less than the full set of justices will hear their case. This variation may be significant for the outcomes of the cases before the court.

## VI. INDIVIDUAL JUSTICE RESULTS

Next examined are individual justices' votes. Figure 4 presents all justices who cast at least twenty-five votes in the combined twenty-year dataset. Each justice is noted by a circle, with the Y-axis representing the percentage of their pro-defendant votes cast.

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32. See *supra* Part II.

The dashed horizontal line is at the SJC's average over the full twenty-years, approximating twenty-nine percent.

FIGURE 4: PERCENTAGE OF PRO-DEFENDANT VOTES, BY JUSTICE<sup>33</sup>

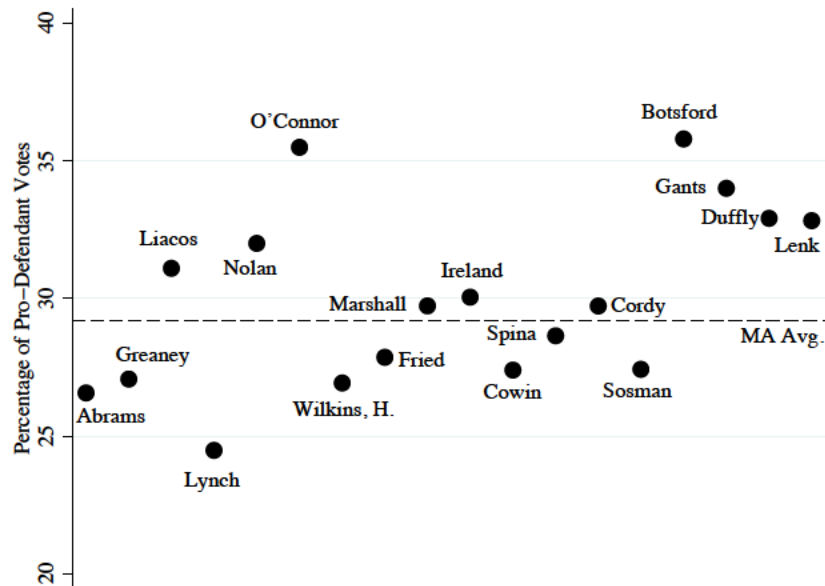


Figure 4 confirms that the justices themselves are tightly distributed from about twenty-four percent to thirty-six percent pro-defendant votes. Justices Botsford (35.7%) and O'Connor (35.4%) have the highest rates while Justice Lynch (24.5%) has the lowest rate. Those three are the only justices above thirty-five percent or below twenty-five percent, and most justices fall within just 2.5 percentage points of the overall average. This lack of variation flows directly from unanimity in decision-making.

Unanimity poses great difficulty to analyzing judicial decision-making by individual justices. To distinguish justices—for example, that a particular justice appears to interpret criminal law in a more pro-defendant fashion than another justice—there must be differences between the justices' votes. In comparison, the Supreme Court of the United States reached unanimous decisions in only forty-one percent of its merit opinions in the October 2014 term.<sup>34</sup> While that Court is far more selective with the cases it

33. See *supra* Part II.

34. SCOTUSblog Stat Pack, SBLOG (June 30, 2015),

hears, the gap between ninety-three percent and forty-one percent is considerable.

Due to the unanimity between the SJC justices, these data are not ideal for more sophisticated analyses of individual justice preferences for pro-defendant outcomes, such as vote scaling<sup>35</sup> or Item Response Theory.<sup>36</sup> These methods rely on differentiating individual justices' choices within each voting opportunity (in this situation, justices' votes within each individual case). They use differing votes to identical questions to simultaneously estimate ideological locations for both justices and the cases themselves (such as, how hard it was, based on the particular nature of the case, to vote in favor of the defendant). All of this requires differences in votes to reveal information about the case itself. Thus, unanimity makes cases uninformative using these methods.

Despite the problems that unanimity poses, it can still be informative to investigate justices' votes. For instance, when a large percentage of cases reviewed are decided unanimously, those fewer cases with split decisions invoke greater scrutiny—if only for not being unanimous. In such cases, the arguments on each side were sufficiently strong as to win at least one vote. The overall average on these votes is about forty-eight percent in favor of defendants, which fits the idea that non-unanimous cases represent more ambiguous legal questions, where the odds of either party winning are much closer to an even proposition. Non-unanimous cases are more likely to reveal individual justices' interpretations of criminal law, compared to unanimous decisions. Since all justices start with the same precedential and statutory base, but reach different conclusions, these datum reflect differences between the justices.

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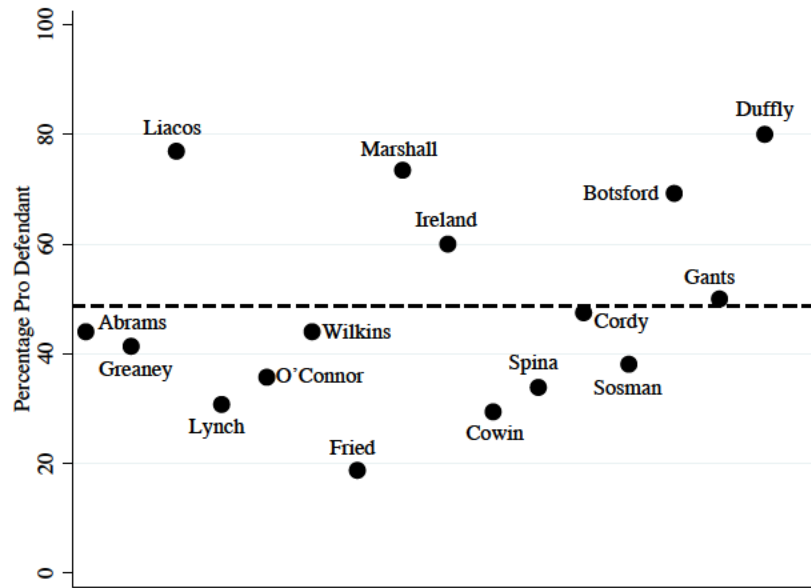
[http://sblog.s3.amazonaws.com/wp-content/uploads/2015/07/SB\\_votesplit\\_OT14.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2015/07/SB_votesplit_OT14.pdf) [perma.cc/82D4-YDLV] (last visited Feb. 15, 2016) (referring to most cases in this dataset as meritless).

35. See generally KEITH T. POOLE & HOWARD ROSENTHAL, *IDEOLOGY AND CONGRESS* (2007); see also Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 AM. POL. SCI. REV. 530 (2011).

36. See generally Andrew Martin & Kevin Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134 (2002); Joshua Clinton, Simon Jackman, & Douglas Rivers, *The Statistical Analysis of Roll Call Data*, 98 AM. POL. SCI. REV. 355 (2004); but see Matthew Hall, Jeffrey Harden, & Jason Windett, *Estimating Dynamic Ideal Points for State Supreme Courts*, 23 POL. ANALYSIS 461 (2015).

Figure 5 presents the percentage of votes for each justice, voting in at least ten non-unanimous cases between 1995 and 2014, favoring the defendant.

FIGURE 5: PERCENT OF VOTES CAST IN FAVOR OF DEFENDANT IN NON-UNANIMOUS CASES, BY JUSTICE<sup>37</sup>



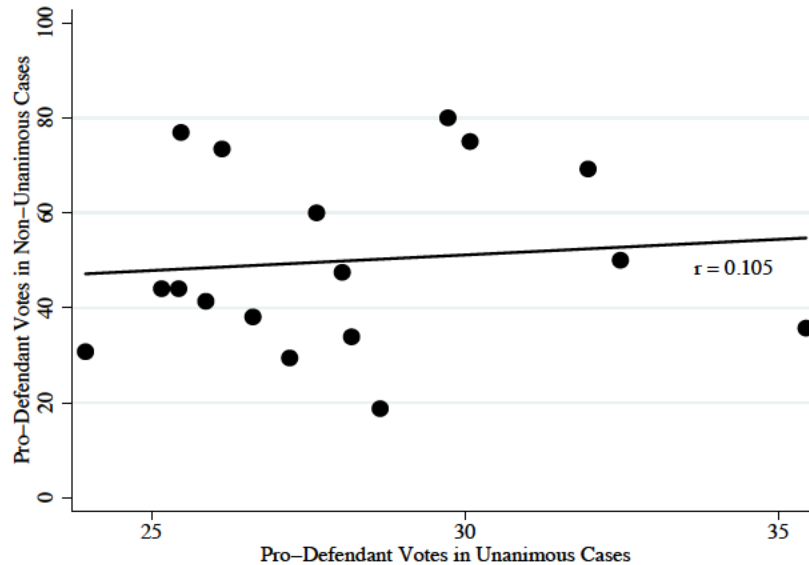
In these votes, the justices show considerably more variation. Justices Duffly (80%) and Fried (18.8%) represent the highest and lowest percentages, respectively. There is no clear time trend to these percentages, with earlier appointees and later appointees each getting high and low scores.

A remaining question is what is the relationship between vote rates in unanimous and non-unanimous cases? That is, do justices who vote more consistently for defendants in non-unanimous cases also vote more frequently for defendants in unanimous cases, or are unanimous cases essentially unrelated to the differences between justices revealed by close cases? To assess this, Figure 6 plots justices' rates of pro-defendant votes in unanimous cases on the X-axis and justices' rates of pro-defendant votes in non-unanimous cases on the Y-axis. Each dot represents a single justice's coordinated percentage. The solid line represents the best

37. See *supra* Part II.

linear fit, which is the line that produces the least error. The  $r$  label is Pearson's  $r$  correlation coefficient<sup>38</sup> for the relationship between the two values.

FIGURE 6: RELATIONSHIP BETWEEN JUSTICES' VOTES IN UNANIMOUS AND NON-UNANIMOUS CASES<sup>39</sup>



There is relatively little relationship between a justice's votes in unanimous and non-unanimous cases. While the two rates are positively correlated, the correlation is a weak 0.105. This means that knowing a justice's rate in one tells us little about the other. It also implies that the unanimous cases are not telling us a lot about the disagreements between justices—which is intuitive—and that

38. See WORLD HERITAGE ENCYCLOPEDIA, PEARSON CORRELATION (ebook), [http://self.gutenberg.org/articles/pearson\\_correlation](http://self.gutenberg.org/articles/pearson_correlation) (last visited Jan. 28, 2016).

In statistics, the Pearson product-moment correlation coefficient (sometimes referred to as the PPMCC or PCC,[1] or Pearson's  $r$ ) is a measure of the linear correlation (dependence) between two variables  $X$  and  $Y$ , giving a value between +1 and -1 inclusive, where 1 is total positive correlation, 0 is no correlation, and -1 is negative correlation. It is widely used in the sciences as a measure of the degree of linear dependence between two variables. It was developed by Karl Pearson from a related idea introduced by Francis Galton in the 1880s.

*Id.*

39. See *supra* Part II.

variation in the unanimous cases largely comes from which justices happen to participate in which cases.

## VII. PARTISAN JUSTICE: DO POLITICS EXPLAIN VARIATION IN VOTES?

The most prominent theory of judicial decision-making in judicial politics literature is the attitudinal model, most fully articulated by Segal and Spaeth.<sup>40</sup> The attitudinal model posits, simply, that justices' rulings are based largely on their preferred policy goals.<sup>41</sup> Each case represents an opportunity for a justice to influence state policy on the topic in question.<sup>42</sup>

Within criminal law, this means that justices have their opportunity to determine how punitive the state will be, how much it will empower law enforcement, and how high a bar it will set for prosecutors to attain a conviction.<sup>43</sup> The attitudinal model posits that justices' positions will be determined *exclusively* by the outcome the justice wants on these policy goals, ignoring existing law and precedent.<sup>44</sup> While admittedly simplistic, it has had strong empirical power for explaining judicial decision making in many judicial contexts.

In the context of the cases analyzed in this Article, the attitudinal model's predictions would be that justices vote in criminal law cases to achieve the policy outcomes that they prefer. Liberal justices would prefer more pro-defendant outcomes while more conservative justices would prefer more pro-prosecution outcomes.

To investigate whether the data analyzed in this Article support this proposition at all, one would need some sense of what individual justices think about criminal law; what are their policy preferences? But this is a very difficult exercise. While their votes are an interesting piece of evidence, it would be tautological to use the votes to explain the votes. In addition, justices rarely publicly reveal their own beliefs and positions.<sup>45</sup> When they do, it is likely

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40. See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (The Press Syndicate of the University of Cambridge 2002).

41. *Id.* at 86–88.

42. *Id.* at 1–3.

43. *Id.*

44. *Id.* at 86–88.

45. Consider the refusal of nominees to discuss their views about cases, which is generally echoed by sitting justices for similar reasons. Robert Post & Reva Siegel,



filtered through a lens of maintaining their public impartiality and the court's image as independent and objective.

Without a direct measure from the justices themselves, a proxy measure of a justice's likely leanings fits best. One approach common in political science is to attribute to an appointee the known positions of their appointer.<sup>46</sup> This works under the logic that when politicians appoint actors (such as justices), they do so with the goal of picking a likeminded individual—liberal governors pick justices that they believe will be liberal justices. For example, Giles and Peppers use information about the President and home-state senators as a proxy measure for the liberalism or conservatism of appointments to the federal bench.<sup>47</sup> Bonica applied this to judges, crediting judges with the ideology of their appointing governor.<sup>48</sup>

Of course, appointers and appointees are rarely perfectly aligned, as Republican presidents have repeatedly found after placing a perceived “conservative” on the court.<sup>49</sup> Still, Republican and Democratic governors likely have different agendas in picking high court justices, and one might expect that this has an effect on some justices' holdings in criminal cases. Figure 7 shows the vote percentages made by appointees of each governor. Thus, the bar labeled Patrick represents the percentage of pro-defendant votes taken by appointees of Governor Deval Patrick.

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*Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 YALE L.J. POCKET PART 38, 38 (2006).

46. See generally Michael Giles, Virginia Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623 (2001).

47. *Id.*

48. Adam Bonica & Michael J. Woodruff, *A Common-Space Measure of State Supreme Court Ideology*, J.L. ECON. & ORG. (Oct. 22, 2014). Note that Bonica's approach is to give individuals a rating based on their recorded campaign finance behavior. Since conservatives are more likely to donate campaign funds to, and receive campaign donations from, other conservatives, it is possible to create a score based on the relationships between donors and recipients. Adam Bonica, *Mapping the Ideological Marketplace*, 58 AM. J. OF POL. SCI. 367 (2014). In the second 2014 article, Bonica applied this approach to state supreme court justices, but since appointed justices often have little or no involvement in campaign finance, they lacked the necessary data to form such a score. Bonica & Woodruff, *supra* note 48 at 10–11. For many of these justices, Bonica & Woodruff applied the score of the governor that appointed them. *Id.*

49. Consider, for example, Justice John Paul Stevens, a Nixon and Ford appointee who ended his career as one of the Court's liberal standard-bearers according to the scores developed by Andrew Martin and Kevin Quinn. Martin & Quinn, *supra* note 36.

FIGURE 7: PERCENTAGE OF PRO-DEFENDANT VOTES, BY APPOINTING GOVERNOR<sup>50</sup>

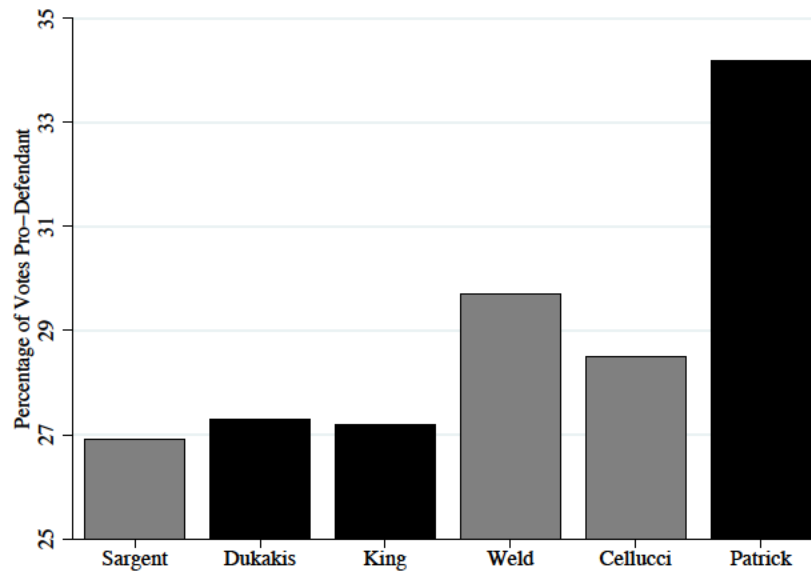


Figure 7 indicates that there are no clear differences across the parties. In fact, while Democratic appointees voted for defendants 29.8% of the time in the twenty-year period, Republican appointees voted for defendants 28.5% of the time, a difference of only 1.3%, all of which can clearly be attributed to Deval Patrick. The appointees of governors from the 1970s and 1980s voted for defendants at almost exactly the same rate, regardless of who appointed them. Republican appointees of the 1990s and early 2000s actually voted for defendants at an increased rate compared to their longer-tenured colleagues. Finally, Deval Patrick's appointments are outliers, with Patrick's appointees voting for defendants at a much higher rate than other appointees. This makes sense since Patrick was one of the most liberal governors in recent United States history.<sup>51</sup> Also, it is important to remember the time dynamics; all of Patrick's appointees came in the last decade, which has had a higher rate of pro-defendant rulings.<sup>52</sup> It is

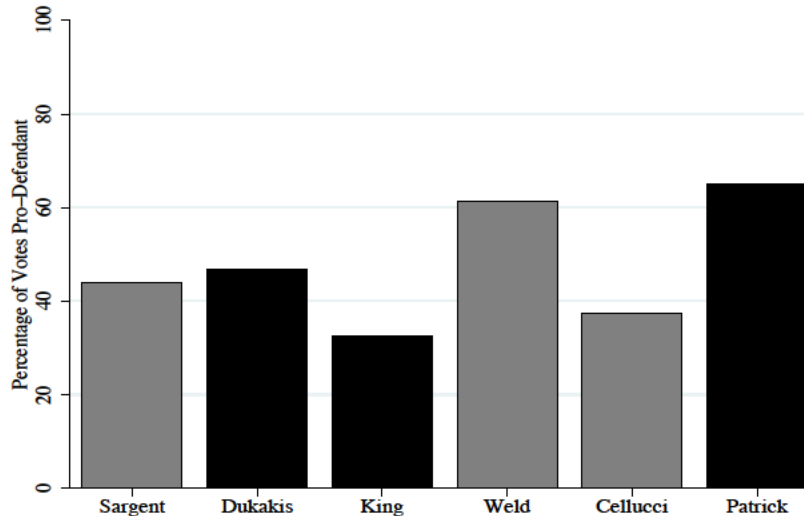
50. See *supra* Part II.

51. See Bonica, *supra* note 48 (depicting CFScores, which find that Patrick is considerably more liberal (-1.18) than his predecessor, Mitt Romney, was conservative (0.879)). In these scores, negative scores are liberal and positive scores are conservative. *Id.*

52. See, e.g., Jim O'Sullivan, *Patrick's Legacy on the Bench*, BOSTON GLOBE

difficult to determine whether Patrick's appointees influenced the decade's overall increase in pro-defendant rulings.

FIGURE 8: PERCENT OF VOTES CAST FOR DEFENDANT IN NON-UNANIMOUS CASES, BY GOVERNOR<sup>53</sup>



Here, there is considerably more variation and Governor Patrick's appointees are again the highest rated pro-defendant at 65.1%. But, Governor Patrick's appointees' percentages are less distinct in this telling; in fact, they're almost equaled by the appointees of Republican William Weld.

#### VIII. CHANGING COURT COMPOSITION OVER TIME

The final analysis takes the information on justices' voting in non-unanimous criminal cases to plot how the court's composition has changed over time. To do this, a seven-member court for each year is constructed out of each justice's vote percentage in non-unanimous cases over the entire twenty-year period. When multiple justices occupied a single seat in a given year, the score of the justice who was on the court for the largest portion of the year was used. Thus, if a justice served until November and was then replaced, that justice would be the one used for this analysis. With this, three facts of interest are determined: the most pro-defendant

(July 31, 2015), <https://www.bostonglobe.com/metro/2014/07/31/patrick-legacy-bench/ny26xx6nycndWDjJPIHgII/story.html> [https://perma.cc/8ULD-6K3V].

53. See *supra* Part II.

justice, the least pro-defendant justice, and the median justice. The median justice is perhaps the greatest indicator of the court's preferences, since this is the pivotal actor or most common "swing vote."

Figure 9 presents these three factors of interest across the entire time period.

FIGURE 9: MINIMUM, MEDIAN, AND MAXIMUM JUSTICE CAREER PRO-DEFENDANT VOTE PERCENTAGE IN NON-UNANIMOUS CASES, BY YEAR<sup>54</sup>

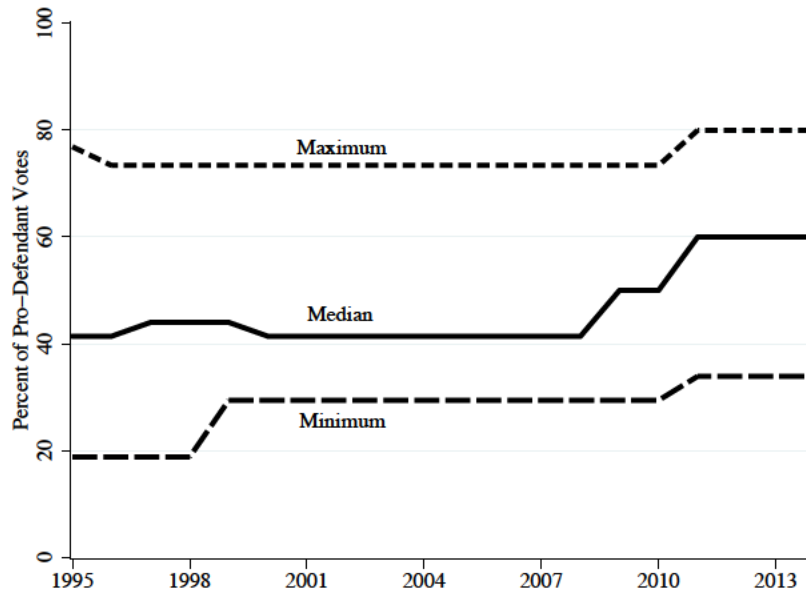


Figure 9 shows that the most pro-defendant justice has remained fairly constant over time, between seventy and eighty percent. The minimum, however, has consistently increased over time, from under twenty percent pro-defendant, to almost thirty-five percent. The most significant movement, however, has been the median justice, which has moved from about forty percent pro-defendant, to about sixty percent pro-defendant in the Governor Patrick years. This is a notable flip that helps explain the court's overall trend spanning the same time period in a pro-defendant direction.

54. See *supra* Part II.

## XI. LESSONS FROM THESE ANALYSES

These data reveal interesting attributes of the Massachusetts Supreme Judicial Court. First, defendants lose a large majority of their appeals before the court. Despite this fact continuing through to 2014, there has been some movement towards more pro-defendant decisions in recent years. Two other facts about the court's criminal law activity quickly become apparent: the vast majority of criminal cases are decided unanimously and most cases feature less than the full complement of justices—creating some randomness in the composition of the court for any one appeal. Analyses of individual justices' votes show that unanimity restricts variation to a small band between twenty-five and thirty-five percent in favor of defendants. The more favorable and unfavorable justices to defendants are not that different in their total pro-defendant vote rates.

However, there is considerably more variation in the small set of non-unanimous cases, which likely feature the most tightly fought legal arguments. In these cases, sufficiently strong arguments were made on each side that they each won at least one vote from one of the foremost jurists in the state. It is in these cases where the prevailing law is less clear, where the "right" outcome is not always apparent, and where reasonable and informed minds may differ. Thus, these cases are also most likely to feature the justices' own predispositions, values, beliefs, and favored policy outcomes. Despite this, there is little evidence of systematic differences between Republican and Democratic appointees. Democratic appointees to the court have been just about as favorable to defendants as Republican appointees have, despite the preferences of the parties diverging on criminal punitiveness. There is some evidence that Governor Deval Patrick's appointees have been more willing to consider defendants' arguments than their predecessors, and that his appointments effectively moved the median of the court in a pro-defendant direction, but these differences are not dramatic. Overall, these analyses imply a court whose selection process—appointment by partisan governors—does not significantly politicize the court's criminal jurisprudence. And it also reveals a court that balances a considerable workload by coming to substantial agreement and unanimity, revealing their differences in only a small number of meaningful cases.